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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1943

No. 319

WILLIAM DAVIES CO., INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT OF PETITION.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

SUMMARY STATEMENT OF THE MATTER INVOLVED.

On December 15, 1941 the National Labor Relations Board entered an order, (B.A. 319-340)[1] finding that the petitioner was guilty of unfair labor practices in violation of Section 8 (1) and 8 (3) of the National Labor Relations Act. 29 U.S.C.A. Sec. 158 (1 and 3).

[1] References are as follows: "B.A." refers to Board's Appendix; "R.A." refers to Respondent's Appendix.

This order was entered upon a charge filed with the Board by the United Packinghouse Workers of America, affiliated with Packinghouse Workers Organizing Committee, affiliated with the Congress of Industrial Organizations, hereinafter referred to as the "Union", (B.A. 6), a complaint filed by the Board (B.A. 7), an answer of the Petitioner (B.A. 11), a hearing and intermediate report by the Trial Examiner (B.A. 16), objections filed by the Petitioner, and oral arguments before the Board.

The Board ordered the Petitioner to cease and desist from discouraging membership in the Union, or any other labor organization of its employees, by discharging or refusing to reinstate any of its employees, or in any other manner discriminating in regard to hire and tenure of employment, or any term or condition of employment of its employees; to cease and desist from in any manner interfering with, restraining or coercing its employees in the exercise of the right to self-organization; to take affirmative action by offering James McNally, James Allen, Michael Moriarity and John Canning full reinstatement to their former or substantially equivalent positions.

On September 24, 1942 a Petition to enforce this order was filed with the United States Circuit Court of Appeals, for the Seventh Circuit, which on June 7, 1943 entered a decree enforcing the order, except with respect to the reinstatement of Michael Moriarity and James Allen, concerning which the court held there was no substantial evidence of discrimination in their discharge.

The Court of Appeals in its opinion (135 Fed. (2d) 181) said:

> "While the circumstances are not numerous or particularly flagrant, yet they do indicate a purpose to interfere with the exclusive right of the employees to engage in organizational activities, for the purpose of collective bargaining, as guaranteed by the Act.

It seems to be necessary to emphasize again that the question of organization by the employees, for the purpose of collective bargaining is the exclusive business and concern of the employees. It is the mandate of the statute that the employer shall not intrude himself into the picture."

The Court of Appeals applied the foregoing reasoning to the following state of facts:

Petitioner, WILLIAM DAVIES CO. INC. is an Illinois corporation, with its principal office and place of business in Chicago, Illinois. It operates plants in Chicago, Illinois and Toronto, Canada, where it is engaged in the processing, sale and distribution of meat products. In the fiscal year ending April 1, 1940 the Petitioner processed approximately 25 Million pounds (B.A. 7).

The Petitioner, in all the years of its existence, enjoyed a background of pleasant and harmonious relationship with its employees and at no time had it been involved in any labor controversy. The Board did not find that there was any background of anti-union activity upon the part of the Petitioner, and the Court of Appeals in its opinion specifically found that the Petitioner had no background of anti-union activity. It was under contract with the engineers' union, covering its engineers; the chauffeurs' union, covering its truck drivers; and the maintenance and electrical workers union, covering its maintenance employees (R.A. 162).

The union never demanded collective bargaining on behalf of Petitioner's employees, nor did the union ever petition the Board for certification as the collective bargaining agent (R.A. 90). Except for the union, no other labor organization, independent or affiliated, ever attempted the organization of its employees, so that no question of discrimination between this and other unions is involved.

There is no finding by the Board contrary to the foregoing facts, and the evidence is undisputed concerning the same, as well as the clear record of Petitioner with respect to lack of threats or interference by the company in the union campaign, except for the alleged specific instances found by the Board on which it bases its order.

The facts found by the Board are as follows:[2]

1. Alleged Coercive Statements (B.A. 322).

During the summer of 1939, Petitioner's employees began to talk about labor organization. However, steps to form an organization at the petitioner's plant were not taken until December. On December 15, 1939, Michael Moriarity, an employee, joined the Union and for the next month endeavored by discussion and distribution of buttons, application cards and leaflets, to obtain members therein. About Christmas of the same year, Frank McCarty, District Director of the Union, was assigned to lead the Union's organizational drive in Petitioner's plant. He called and conducted meetings and supervised the distribution of leaflets to the Petitioner's employees.

John Canning, an employee in the vein pumping department, testified that about December 16, 1939, Henry Wichmann, the petitioner's superintendent, approached him at his work bench and, after asking him how long he had been in the petitioner's employ and whether he could obtain a job elsewhere if the petitioner discharged him,

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[2] The Board made many findings of fact notwithstanding substantial and convincing evidence to the contrary adduced by the Petitioner, but in view of the decisions in:

N.L.R.B. v. *Nevada Consolidated Copper Corporation*, 316 U.S. 105

N.L.R.B. v. *Link Belt Co.*, 311 U.S. 584

in the following statement we summarize the facts as found by the Board and not any countervailing evidence, unless otherwise expressly indicated.

stated that there were "men walking the streets today that are laid off on account of trying to organize the union. . . . You have your rights and I have my rights and . . . this is no warning against your job . . . this is just a little friendly talk." Canning nevertheless joined the union on December 23, 1939, and about four days later began wearing his union button in the plant.

Canning was selected as the union steward in the vein pumping department. He testified, in this connection, that on the first day he wore his steward's button at the plant, James McMahon, his foreman, asked him whom he "was stewarding it over"; and that upon the following pay day McMahon said to him: "Here is your check, pin it on your button so you won't lose it because you seem to know all the answers."

Shortly after December 28th, when Ahern, an employee returned to work following a brief lay-off, McMahon (a foreman) said to him: "I hear you are organizing a union again." About the same time, McMahon reasserted his previously expressed concern about the Union by inquiring of Boland, another employee, how strong the Union was and chiding him when he replied that he did not know.

On or about January 9, 1940, James McNally and other employees received an increase in pay. McNally testified that Michael Brennan, the plant manager, in giving him the increase, stated: "You are getting more pay now than fellows across the street, although they have a contract there." The record shows that Brennan was referring to employees at the Agar Packing Company plant located across the street. That company had a collective bargaining agreement with the Packinghouse Workers Organizing Committee.

On January 14, 1940, Moriarity spoke to his fellow employee, Kirby, about the Union. Kirby reported the in-

cident to Wichmann, whereupon Wichmann summoned Moriarity to the petitioner's office. In addition to Moriarity, Wichmann and Brennan, Perry, the petitioner's vice president and McLeod, the petitioner's Canadian general superintendent, were also present. McLeod stated that he was surprised that there were disturbances in the plant, and that "We never have any trouble in any of our houses about union activities." Moriarity replied "Well, this house is different, here you have unions in all of the houses around you."

Perry thereupon remarked, "I don't think the fellows would go for a union here . . ., on account of the dues."

The Board found that the Respondent, by the foregoing acts and conduct, interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. The Notice Forbidding Solicitation.

On January 6, 1940, the petitioner posted in its plant a notice prohibiting "the solicitation on company premises for membership in or for the purposes of collecting dues for any labor organization" and warning employees that "violators will be subject to dismissal" (B. Ex. 3; B.A. 318).

The petitioner contended that the reason for the rule was to maintain production and proper discipline. The Board found that although there was union activity and discussion in the plant, that it did not, as distinguished from other types of activity materially impair production or discipline (B.A. 327); neither did the rule prohibit discussion (B.A. 328). The Board further found that the posted rule forbade only union solicitation and that petitioner had in fact permitted other forms of solicitation at the plant. Thus, petitioner had not objected to solicitation for members in a good fellowship club, and had con-

sented to solicitation of employees in behalf of an insurance company on the premises (B.A. 327-328).[A]

The Board found that the petitioner posted the notice and enforced the rule therein contained in order to defeat the union membership drive and thus interfered with, restrained and coerced employees in the exercise of rights guaranteed in Section 7 of the Act (B.A. 329).

3. Alleged Discrimination in Discharges.

The Board found in the case of John Canning (B. A. 334) the petitioner claimed that the discharge was due to inefficiency in his work. The Board made no finding that he was not inefficient, but held that nevertheless the ground assigned by the petitioner was merely a pretext for covering up a discharge for Union activity, but the Court of Appeals stated:

> "There seems to be no question but that Canning had not properly performed his work."[B]

Nevertheless, the Court upheld the Board with respect to this discharge.

With respect to James McNally, the Board found (B. A. 330), petitioner discharged him for allegedly violating the rule which forbade solicitation of membership (B. A. 318), but held the rule discriminatory and his discharge for advocacy of the Union. The evidence is undisputed that McNally did repeatedly violate the rule and was discharged as a disciplinary measure only after being warned against further violations (B.A. 150, 151, 140 and 156).

The Trial Examiner in the Intermediate Report also recommended that an employee, Clarence Balda, a union member, be reinstated because his discharge was discrim-

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[A] This occurred in 1938, eighteen months prior to union campaign (B.A. 146, 148).

[B] Canning admitted his inefficiency was not casual and a violation of express instructions (R. A. 224).

inatory (B.A. 49). The Board, however, found with respect to said employee, (although the evidence showed he was guilty of substantially the same offense as John Canning (B.A. 336) namely, the failure to inject a proper amount of "pickle", the only difference being that Balda was required to but failed to use a calculator and Canning did not have a measuring device), that the discharge was not for union activity or membership, and dismissed the complaint with reference to him (B.A. 337).

With reference to the discharges of Canning and McNally, the Court of Appeals said in its opinion (135 Fed. (2), p. 182):

> "The evidence supporting these two cases is so fine as to approach the last limit between evidence and no evidence. A fair-minded person might well conclude that the Board was prejudiced in its action as counsel for the respondents seems to think. We have no power to review the Board's decision because it may seem to be prejudiced. We do think that the Board's decision in this case has reached the limit to which a court might go to sustain it."

BASIS OF JURISDICTION OF THIS COURT.

The jurisdiction of this Court is invoked under:

(a) 239 and 240 of the Judicial Code, as amended on February 13, 1925 (U.S.C. Title 28, Sec. 346 and 347);

(b) Sec. 10(e) of the National Labor Relations Act (49 Stat. 449);

(c) The decree sought to be reviewed was entered by the Circuit Court of Appeals, of the Seventh Circuit on June 7, 1943. The opinion is reported in 135 Fed. (2d) 179.

QUESTIONS PRESENTED.

(1) Is the employer's constitutional right of freedom of speech and right to employ and discharge its employees completely restricted during a union organization campaign, so as to make any act done or thing said by him during such campaign an unfair labor practice within the meaning of Sections 7 and 8 (1) of the National Labor Relations Act?

(2) Do the acts and conduct of the petitioner in this case constitute unfair labor practices within the meaning of Sections 7 and 8 of the Act?

(3) Is a finding by the Board that an employee has been discharged for union activity or membership supported by substantial evidence, when the sole basis for such finding is such union membership or activity as against the admitted fact that the employer had *bona fide* cause for discharging the employee on other grounds?

REASONS FOR ALLOWANCE OF WRIT OF CERTIORARI.

1. The broad definition by the Court of Appeals of what is sufficient to constitute a violation of Section 8(1) gives no effect to the right of free speech of the employer, and is in direct conflict with the decision of this Court in *N. L. R. B.* v. *Virginia Electric & Power Co.*, 314 U. S. 469, and with the reasoning of this Court in the cases of *Thornhill* v. *Alabama*, 310 U. S. 88; *Carlson* v. *California*, 310 U. S. 106; *Cantwell* v. *State of Connecticut*, 310 U. S. 296; *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.*, 312 U. S. 287; *American Federation of Labor* v. *Swing*, 312 U. S. 321. It is also in conflict with the decisions of other Circuit Courts of Appeal.

N. L. R. B. v. *American Tube Bending Co.*, 134 Fed. (2d) 993, 995.

N. L. R. B. v. *Ford Motor Co.*, 114 Fed. (2d) 905; C. C. A. 6.

Midland Steel Products Co. v. *N. L. R. B.*, 113 Fed. (2d) 800; C. C. A. 6.

N. L. R. B. v. *Union Pacific Stages, Inc.*, 99 Fed. (2d) 153; C. C. A. 9.

Humble Oil & Refining Co. v. *N. L. R. B.*, 113 Fed. (2d) 85, 89; C. C. A. 5.

A clear-cut decision by this Court on the proper construction of the words "interfere, restrain or coerce" used in Section 8 (1) of the Act with reference to the constitutional right of freedom of speech is of vital importance.

(2) The Court of Appeals has rendered a decision in conflict with the decisions of other Circuit Courts of Appeal with respect to the question as to the burden of proof on discharges for alleged union activity. The Court of Appeals expressly found that there was no question that Canning had not properly performed his work, yet held that the mere fact of union membership and activity on the part of such employee was substantial evidence sufficient to support a finding by the Board of a discriminatory discharge.

The courts of appeal in other circuits have decided this question to the contrary, holding that against a showing of other *bona fide* cause for discharge, the mere fact of union membership or activity on the part of the employee, was not sufficient evidence to satisfy the burden of the Board that the discharge was discriminatory.

N. L. R. B. v. *Sun Shipbuilding & Drydock Co.*, (3d Cir.) 135 Fed. (2d) 15.

Martel Mills Corporation v. *N. L. R. B.*, (4th Cir.) 114 Fed. (2d) 624.

N. L. R. B. v. *Williamson Dickie Mfg. Co.*, (5th Cir.) 130 Fed. (2d) 260.

N. L. R. B. v. *Goodyear Tire & Rubber Co. of Alabama,* (5th Cir.) 129 Fed. (2d) 661.

N. L. R. B. v. *Riverside Mfg. Co.* (5th Cir.) 119 Fed. (2d) 302.

N. L. R. B. v. *Tex-O-Kan Mills Co.,* (5th Cir.) 122 Fed. (2d) 433.

Stonewall Cotton Mills, Inc. v. *N. L. R. B.,* (5th Cir.) 129 Fed. (2d) 629.

Dannen Grain & Milling Co. v. *N. L. R. B.* (8th Cir.) 130 Fed. (2d) 321.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari issue out of and under the seal of this Court, to the end that this cause may be reviewed and determined by this Court, and that the said decree of the United States Circuit Court of Appeals, for the Seventh Circuit, may be reversed and the order of the said National Labor Relations Board entered December 15, 1941, be not enforced against your petitioner, and that your petitioner be granted such other and further relief as may be proper.

Respectfully submitted,

WILLIAM DAVIES CO., INC.,
Petitioner.

By LEWIS F. JACOBSON,
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Counsel for Petitioner.